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# A Just World Under Law: A Just and Peaceful World Under the Rule of Law

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# A JUST WORLD UNDER LAW

*A JUST AND PEACEFUL WORLD UNDER THE RULE OF LAW*

By

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# A JUST WORLD UNDER LAW

## A JUST AND PEACEFUL WORLD UNDER THE RULE OF LAW

The President of Golden Gate University

The Dean of Golden Gate University School of Law

Distinguished Members of the American Society of International Law

And the American Society of Comparative Law

Illustrious Visiting Fulbright Scholars in Residence

### I : GENERAL OBSERVATIONS

#### 1. HISTORICAL PERSPECTIVE

##### (a) The American Society of International Law

Today, Golden Gate University School of Law is proud and privileged to be able to host its Fourteenth Regional Meeting of the American Society of International Law in combination with its Fifteenth Annual Fulbright Symposium. This year is especially auspicious. It coincides with the centennial celebration of the American Society of International Law. Golden Gate's event is the first of the series of centennial regional meetings of the Society beginning from 1 April 2005 to 31 December 2006 to commemorate the first hundred years of its existence.

It is a distinct honor for me to submit to you a brief report of some of ASIL's worthy achievements in the studies and researches, contributing to the progressive development of international law as well as promoting the appreciation and dissemination of the knowledge of contemporary international law in the span of its first century with some concrete positive results in support of international law and order.

Although the United States did not attend the first Hague Peace Conference in 1899, it did not fail to participate fully in the 1907 Second Hague Peace Conference leading to the adoption of various Hague Regulations and Hague Conventions, the establishment of the Permanent Court of Arbitration and the Permanent Court of International Justice with their Office at the Peace Palace where the two institutions are located, namely, the Secretariat of the Permanent Court of Arbitration and the office of the Registrar of the International Court of Justice, functioning today as successor to the Permanent Court of International Justice. The facilities have been donated by the Carnegie Endowment with full support of the United States Government. American Judges have continued to sit on both benches of the World Courts and American Arbitrators have continued to serve on the Permanent Court of Arbitration. American Judges and Arbitrators, such notably as Judge J.B. Moore, Judge C.C. Hyde, Judge M.O. Hudson, Judge G.H. Hackworth, Judge P.C. Jessup and President S. Schwebel have not ceased to inspire the progressive movement of the Courts towards the search for and identification of the

appropriate Rules of International Law to be applied in the settlement of disputes between States or in response to requests submitted by international organizations for advisory opinions of the Court.

Due to the United States adherence to the Monroe Doctrine of non-intervention and the Stimson Doctrine of non-recognition, America did not initially play a very active role in international conferences. For instance, it had not seen fit to become a member of the League of Nations. But this did not stop American Jurists from serving on the Permanent Court of Arbitration or the Permanent Court of International Justice. The latter did not form part of the League of Nations, unlike the International Court of Justice, which *ab initio* has staged its appearance as a principal organ of the United Nations. Since World War II and even during the inter-war period, the United States has opted for a peaceful world, a just world under law and has since been pursuing a steady course towards the establishment and maintenance of a "WORLD PEACE THROUGH WORLD LAW." The United States has upheld its ideal of justice under law by lending its generous helping hand and taking a more active part in the construction and promotion of a World of Peace and Justice under the Rule of Law.

*publication continued*  
In retrospect, the American Society of International Law started the publication of its Journal on a quarterly basis as early as 1907, just over a year of its existence. This activity has been on going with hardly any interruption, right up to the present millennium with further publication of a collection of contemporary source materials known as the International Legal Materials. Both publications form part of the material sources for the unceasing process of codification and progressive development of international law since the inception of the American Society at the dawn of the last century, tarnished by the scourge of war, which twice in our life-time has brought untold sorrow to mankind.

*and practice*  
*and progressive development*  
In the academic fields, the American Society of International Law, together with the Harvard Law School, has undertaken far-reaching researches in international law, based on the practice of States, in the form of Harvard Draft Conventions published in the Supplements to the American Journal of International Law. To cite notable examples, the Supplements for the years 1929, 1932, 1935 and 1939 cover a wide-ranging variety of subjects fit for codification/in international convention such as Nationality, Territorial Waters, State Responsibility (1929), Diplomatic Privileges and Immunities, Competence of Courts with Respect to Foreign States, Consular Officers, Piracy (1932), Extradition, Jurisdiction with Respect to Crime, Treaties (1935), Judicial Assistance, Neutrality, Rights and Duties in Case of Aggression (1939). These publications recording the results of researches undertaken by the American Society under the auspices of the Harvard Law School have formed a solid basis for several reports and draft conventions prepared a few decades later by the International Law Commission and adopted as United Nations Conventions, such as the Law of the Sea Convention (1982); Vienna Convention on Diplomatic Relations (1961); and the Law of Treaties (1969); the Law of Non-Navigational Uses of International Watercourses (1997); the Law of State Responsibility (2001); and the United Nations Convention on Jurisdictional Immunities of States and Their Property (2004). The last instrument is an updated version of the initial draft prepared by myself as the first Special Rapporteur on the topic since 1978, and approved at first reading by the Commission in 1986..

Within the framework of the International Law Commission, American publicists have contributed to the codification and progressive development of the Law of International Watercourses with four American out of five Special Rapporteurs on the topic, namely, Richard

D. Kearney, Steven M. Schwebel, Jens Evensen, Stephen McCaffrey and Robert Rosenstock. On this auspicious occasion, I would like to recall these memorable contributions to the codification and progressive development of international law in this particular field as well as in all other fields. It is part of the United States legacy for the common benefit and heritage of mankind.

In 1992, Golden Gate was first sponsored by the American Society of International Law to convene regional meetings for the Western Region from Seattle in Washington in the North to San Diego in Southern California. This year marks the Fourteenth such Regional Meeting organized and hosted by Golden Gate University School of Law in cooperation with the American Branch of International Law Association through its Presidents, Professor James Nafziger, and the American Society of Comparative Law, especially Professor Richard Buxbaum, its current Honorary President.

*Conjunct. Sr. McCaffrey, McHenry, N. Rosenstock, H. King  
Conjunct. B. Lutz, Schneider, C. L. Lutz, C. L. Lutz*

(b) The Council for International Exchange of Scholars (CIES) and the Fulbright Foundation

Since 1991, Golden Gate University School of Law has received a grant from the Fulbright Foundation through the Council for International Exchange of Scholars to convene the Annual Fulbright Symposium on current international legal issues. Today marks the fifteenth such Fulbright Symposium. In reality with the combined efforts of honorable Members of the American Society of International Law, Golden Gate has structured a model of joint annual conference, so as to promote further international understanding and exchange of knowledge and experiences in the field of international law between Members of the American Society of International Law in the Western Region, especially the Bay Area, and the distinguished Fulbright scholars in residence. Each year, there have been a handful of international legal scholars whose presentation at the Symposium has never failed to enrich the debate and enlarge the broader basis of mutual understanding between American and Non-American international legal scholars in the United States, resulting in mutually improved understanding of common and at times diverse positions on a given international legal problem.

The CIES provides travel expenses for the Fulbright Scholars in Residence in this country to visit San Francisco to take part in the Fulbright Symposium and the Regional Meeting of the American Society. Golden Gate on the other hand invites the visiting Fulbright Scholars and accommodates them for the period of the symposium, a mutually beneficial partnership with benefits for American and Non-American international legal scholars alike.

For the sponsorship of the Annual Fulbright Symposium for the past fifteen years, I wish on behalf of Golden Gate University School of Law to place on record our grateful appreciation of the generous contribution of the Council and the Foundation which strive to promote better understanding between overseas scholars in residence and United States international scholars in the field of codification and progressive development of international law.

2. ACKNOWLEDGEMENTS

Before submitting the substantive part of my report, it is customary for me to keep the traditions of Golden Gate in the first place to express my personal gratitude to the leadership of

the University, starting from President Otto Butz who shared with me the chief editorship of the Annual Survey of International and Comparative Law, President Stauffer and the current President Phil Friedman of Golden Gate University, who have regularly graced the opening of each annual session of the Regional Meeting of the American Society of International Law and the Fulbright Symposium with their blessings and benedictions.

The three successive deans of the Law School have consistently been supportive of the Annual Conferences. In particular, Emeritus Dean Anthony Pagano who will be remembered for his initiative in establishing for the first time in the history of the Law School the Center for Advanced International Legal Studies. Dean Emeritus Peter Keene has lifted the Center upward to another level of international standing and reputation. It remains for the current Dean Frederic White to maintain and further strengthen the Center for succeeding generations.

Last but not least, the Center is institutionally indebted to a triumvirate of pioneers in international legal studies, namely, Professor Marc Stickgold, who introduced Golden Gate to the Fulbright Foundation and the CIES, and Professor Joel Marsh and Professor Barton Selden, who have unfailingly provided the necessary support in manpower and brainpower to bring to fruition the fondest dreams of many Golden Gate alumni and students who, prior to the founding of the Center for Advanced International Legal Studies, had been clamoring and pressing for the Law School to give birth and life to their ambitious project. Once realized, their plan has succeeded beyond expectation and virtually brought the Law School into the lime light of international legal studies with all its splendid programs of summer studies abroad and the continuing furtherance and addition of new courses in the field of international legal studies, including international organizations, the law of the sea, outer space law, the law of international armed conflicts, international human rights, international environmental law and pacific settlement of international disputes between States, between the private sectors, and between States and nationals of other States.

## **II : A JUST WORLD UNDER LAW**

### **A JUST AND PEACEFUL WORLD UNDER THE RULE OF LAW**

It should be observed at the outset that the phrase 'A Just World under Law' is a broad and ideal concept capable of a more or less liberal interpretation. Its scope is not capable of precise determination and could be all-embracing.

For present purposes, our Conference is to run for only one day with two sessions, morning and afternoon, thereby we are necessarily limited *ratione temporis*. The organizers have agreed on certain limitations and restrictions to confine the scope to only a few selected areas of topical legal aspects of international relations that contribute to 'A Just World', which in turn needs identification and clarification. 'A Just World' must be not only fair but also peaceful, i.e., free from unnecessary use of force or from any use of unnecessary force, let alone any use of force which is prohibited by international law with only very few exceptional circumstances. Justice for this purpose is thus associated with a combination of two concepts : fairness and peacefulness or absence of forcible measures unilaterally taken by any State individually or collectively by a group of States, without justification or permissible excuses.

The expression 'under law' is only meaningful if it refers to 'World Law' and not the imperial law of any particular nation State, be it a Super State or a World Power, whose law could be more persuasive or is backed up by greater potentials of sanctions to compel compliances than the national law of a weaker and less powerful nation State.

I shall now proceed to examine the two criteria in the light of events that have taken place relatively recently to be contemporaneous with the current trend of international legal developments.

### **III : A JUST WORLD IS A PEACEFUL WORLD WITHOUT THE USE OF FORCE**

Justice is an ideal that is still out of reach for most of us humankind even within a free society. That is why there must be law and legal order, and a police force to apprehend the wrong-doers and to prevent as far as possible any wrongful acts from ever being committed and when committed to wipe out the consequences of such wrongful acts.

The Executive, the Legislative and the Judiciary as well as the legal profession must cooperate and coalesce, in spite of the need in some democratic countries, such as the United States, for the successful separation of power which has to be accompanied by a balancing act on the conscious part of each branch of the government, thereby commanding equal respect from the members of the free society. Each of its components, namely, the Congress or National Assembly or Parliament, the Executive or the President or the Head of State and Head of Government as well as the administrative agencies of the nation State, the Judicature or Judiciary or the Courts of Law or often times named 'the Court of Justice' and the legal profession constituting a component of the instrumentality to ensure justice that must be blinded to avoid all possible biases, prejudices and discriminating practices.

In most if not all legal systems, justice is an ideal rather than a realizable condition of fact. It requires utmost cooperation and coalescence from all the branches of the government of a country, be it an Empire, a Kingdom or a Republic, being a more or less democratic institution from whatever theories of democracy one may select, a Western ideology, or Eastern Dharmashastra or Islamic Shariah. Cultural differences are inherent in the essential components of free societies. Justice must be achieved and maintained, not only for prototype 'democratic States' but also for other types of democracy which could be more or less liberal. Every State should be free to think and to choose the form of government it may adopt and its people may be inclined to accept. Western democracy is not an ideal that can be forcibly imposed on people without a background of western education or civilization and culture. Globalization of government must make allowances for variations and differences within democratic institutions. The process of democratization itself implies the need for voluntary acceptance and reception. If a system is sound, it will be adopted and maintained without much deliberation or hesitation. Take the example of Roman law, which has been received into the civil law system and despite its imposition on the common law world through Caesar's conquest of England and Western Europe in the last century before Christ. By the year 55 B.C. and a long time thereafter, Roman law prevailed all over Europe. It was spread to Asia, Africa and Latin American, more by way of reception of the civil code, French, German and Spanish rather than by imposition. Unlike the common law which was almost unconsciously imbued with Roman law through the absorption

of medieval canon law principles, the civil law had originally been imposed but was subsequently adopted and adapted to accommodate the needs of a particular legal system.

Even in a peaceful world without international or internal armed conflicts, it is not to be taken for granted that the world can be just for every nation, every people and everyone, be it a child, an infant, and unborn fetus, a woman, a man, or a person with neutral, common or double or dubious gender. A world without discrimination can be a peaceful world and working towards its justifiable existence.

But a world ridden with conflicts, especially armed conflicts, cannot be a peaceful world. A world without peace cannot afford to direct its fullest attention to the question of justice, thus making justice an ideal, which is illusory and practicably unattainable. To be able to attain justice to merit the term or ideal of 'a just world', further and relentless effort must be made by all nations towards ensuring 'enduring peace' or peace that is lasting, if not indeed everlasting or an eternally peaceful world. A number of notable recent events including the use of force in this connection need to be reexamined.

#### 1. The use of force by the Coalition Authority against Iraq 1991

The quest for peace or a just and peaceful world seems elusive, as peace cannot be secured without the use of force or enforcement measures to mend, restore and maintain international peace. It is clear that world peace which is essential for a 'just world' cannot be realized without the consciousness and willingness on the part of all the denizens that populate the earth, and that some sacrifice need to be made to attain peace and to obtain freedom from armed conflicts. Although we have successfully outlawed war, i.e., the shooting war, but that was only in theory. In actual practice, peace has never stayed on this earth for any durable period. The advent of the United Nations has played a useful role in preventing the occurrence of a Third World War. But by far, it has not yet achieved the elimination of conflicts likely to disturb the peace of the world. World peace is one and indivisible. No one could sit idly by when a neighbor's house is on fire. However, it is not every one that is in the position to come to the help or rescue of a neighbor in distress because of a disturbance of internal or regional peace.

There was some light at the end of the tunnel by 1990 after the disintegration of the Soviet Union, the fall of the Berlin wall, the end of the cold war and the return to law and order in the world of relative peace, as permanent members of the United Nations Security Council began to appreciate the need to refrain from the use of veto to obstruct a draft resolution, or a more emphatic resolve of the overwhelming majority of United Nations member countries to rally in support of peace, to resist aggression and to repel an armed attack by responsible use of measured force to avoid escalation from local armed conflict into national, regional or global conflagration.

The action on behalf of the United Nations by the coalition forces, following a unanimous vote in the United Nations Security Council in Resolution 678 of November 29, 1990, authorized under Chapter VII (articles 41 and 42), the use of all means necessary (including the use of force) following the launching of operation 'desert shield' to commence another operation known as operation 'desert storm' to restore international peace and security. It should not go unnoticed that not only the Security Council Resolution 660 on the day of the invasion of Kuwait on August 2, 1990, and subsequent resolutions, notably Resolution 662 of August 9, 1990,



declaring the illegality of Iraq's annexation decree regarding Kuwait, but also the League of Arab States had reached a historic decision to use collective force in the defense of Kuwait and other Arab States attacked by Iraq, such as Saudi Arabia and the United Arab Emirates

The response of the coalition States of the free world to resist the invasion and occupation of Kuwait by Iraqi forces reinforced by the Security Council Resolution denouncing Iraqi annexation of Kuwait as illegal, has indeed vested the coalition forces with legitimacy as well as rightfulness to restore peace and order. The Security Council in Resolution 687 has in fact laid down conditions for the cease-fire and the terms of peace, comprising (i) measures *ex nunc* (for now), meaning the cessation of hostilities by Iraq; (ii) measures *ex tunc* (by then), compelling immediate withdrawal of Iraqi troops from Kuwaiti territory and the establishment of neutral zones and no fly zones as well as the creation of United Nations Compensation Fund and United Nations Compensation Commission (UNCC) to determine the measure of compensation for the losses suffered by Kuwait and other entities and nationals as a consequence of Iraqi invasion and occupation of Kuwait; and (iii) measures *ex ante*, i.e., to prevent further repetitions of the internationally wrongful acts committed by Iraq which essentially comprehend, *inter alia*, the deployment of United Nations and International Atomic Energy Agency (IAEA) inspection team and verification team to ensure the destruction of nuclear arsenal and nuclear capabilities as well as the possibility of producing weapons of mass destruction (WMDs). These included chemical and biological weapons, thereby calling for strict observance of obligations under the Geneva Protocol (1925) and prohibition of the use of biological and toxic weapons, including the missiles and their means of delivery. In other words, the Resolution covered all the measures contemplated by the law of State responsibility, once an internationally wrongful act was established and attributed to Saddam Hussein's Government of Iraq. All the three dimensions of measures have been called into play :

- (i) *Ex nunc* for immediate effect to cease all war-like activities and hostilities;
- (ii) *Ex tunc* in retrospect for remedying the consequences of Iraq's internationally wrongful acts; and
- (iii) *Ex ante* to prevent or preempt the feasibility of repetition or recurrence of Iraq's internationally wrongful acts, including obligations under the Treaty on Non-Proliferation of Nuclear Weapons (1968) and the means of delivery.

(a) Security Council Resolutions

Authority and legitimacy of the actions taken by the coalition forces pursuant to Security Council Resolution 678 (1990) and the cease-fire terms and conditions contained in Security Council Resolution 687 (1991) are beyond controversies. In particular, actual implementation of the term of the cease-fire agreement under the supervision of the responsible coalition forces must comply with the requirements of the law of international armed conflict. The propriety of the administration and management of funds by United Nations officials in the U.N. Oil-for-Food Programme for Iraq must likewise meet the expected minimum international standard. This problem will continue to occupy the attention of publicists for years and decades to come. There should be a search for ways and means to prevent irregularities and non-observances of the Geneva Conventions of 1949, and how to pre-empt and rectify the effect of abuses and misconducts by United Nations peace-keeping missions, and more importantly also how to make

good the losses of parts of the proceeds of sale of Iraqi crude oil, authorized half-yearly by the Security Council as recommended by the Governing Council of the UNCC.

The validity of the measures taken, pursuant to Security Council Resolutions 660, 662, 664, 665, 666, 667, 669, 670, 674, 677, 678 and 687, by the coalition forces and the activities of the various United Nations, IAEA and NGO's missions in Iraq are legally founded on the Charter provisions of Chapter VII (Articles 41 and 42) permitting the use of force and other necessary measures to restore law and order and to maintain peace and security by and with the approval of the United Nations Security Council.

(b) Self-defense under Article 51 of the Charter

In the case of operation 'desert shield', this was intrinsically based on the inherent right of self-defense, individual and collective, to defend and shield Saudi Arabia, United Arab Republic and other States within the region from extended armed attacks by Iraq. But the restoration of Kuwaiti sovereignty by the coalition forces had to be based on something more sophisticated, such as Security Council Resolution 678 (1990) to justify operation 'desert storm'. It was too late in fact for Kuwait to invoke merely Article 51 in spite of the United Nations non-recognition and annulment of Iraq's purported annexation of Kuwait.

2. US/UK Invasion of Afghanistan after 9.11 Armed Attacks

The inherent right of self-defense is recognized in Article 51 of the United Nations Charter for collective as well as individual measures in case of an armed attack. For the events of 9.11, the Security Council, on the very next day 9.12 adopted unanimously SCR 1368 (2001), which

*"1. unequivocally condemns in the strongest terms the horrifying terrorists attacks which took place on 11 September 2001 in New York, Washington D.C., and Pennsylvania, and regards such acts like any act of international terrorism, as a threat to international peace and security....."*

*"5. Expresses its readiness to take all necessary steps to respond to the terrorist attacks on 11 September 2001, and to combat all forms of terrorism, in accordance with responsibilities under the Charter of the United Nations."*

This unanimous resolution of the Security Council, at the minimum, contains the following findings and determinations.

(1) It recognizes and reaffirms the inherent right of individual and collective self-defense in accordance with the Charter. It clearly reaffirms the Council's recognition and endorsement of the right of individual and collective self-defense under Article 51.

(2) It establishes the finding of the occurrence of armed attacks under Article 51, thereby enabling the United States to resort to 'all necessary steps to respond to terrorist attacks of 11

September 2001. The response may be collective, so as to include the assistance of NATO and other allies such as the United Kingdom, France and Australia.

(3) It calls on States and international community to prevent and suppress Terrorist Acts, in particular, it also adopts Resolution 1373 of September 28, 2001, and recalling Resolution 1269 of October 19, 1999, it decides that all States shall inter alia

- Suppressive & preventive measures*
- (i) prevent and suppress the financing of terrorist acts;
  - (ii) take necessary steps to prevent the commission of terrorist acts, including by provisions of early warning to other States by exchange of information, i.e., calling upon all States;
  - (iii) exchange information and cooperate on administrative and judicial matter to prevent the commission of terrorist acts;
  - (iv) note with concern the close connection between international terrorism and transnational organized crime, illicit drugs, money laundering, illegal arms trafficking, etc.; and
  - (v) declare that acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations.

The collective measures undertaken by the United States, together with its NATO and other Allies such as the United Kingdom and Australia, to launch an all out attack against the terrorist groups and the Taliban Government that allowed the Afghan territory to be used as training ground and facilities, but also refused to surrender Osama bin Laden, the notorious leader of the Al Qaeda in hiding in Afghanistan after an ultimatum or *mise en demeure* was duly delivered to Afghanistan.

The pursuit of the terrorists to eliminate them was a permissible measure of collective self-defense after the armed attacks have been found to have taken place against the United States. Similar attacks have been committed in Bali and Madrid in different forms and the threats of further attacks against the United States, its official chanceries, embassies and consulates abroad as well as United States warships, American citizens and corporations seem to be continuing unabated.

There has been little or no opposition to the defensive measures taken by the United States, such as the Patriot Act (2001), the Maritime Transportation Security Act (MTSA 2002), and the creation of the Homeland Security Agency, although precautionary measures undertaken on behalf of the United States to ward off the harm and to pre-empt possible terrorist attacks and activities may have given rise to some hardship for foreign vessels visiting or foreign visitors to the United States. There have been exciting moments for a few incoming flights under suspicion since the sudden change of position, policy and practice, giving rise to new rules in aviation safety law whereby a commercial or civilian aircraft in flight under suspicion of being hijacked and converted into a weapon of mass destruction (WMD) could be ordered to be shot down from the sky by United States fighters to ensure safety on the ground of the homeland, thereby heightening the degree of risks in national and international aviation.

Mistakes or any slight errors in human judgment once committed would appear in many instances, to be irreversible and the consequential losses irreparable. This is only a last resort measure that should not be ordered unless the necessity for self-defense is 'instant and overwhelming, leaving no choice of means and no moments of deliberation.' This test of legitimacy of pre-emptive strike or preemptive self-defense commonly adopted by the Anglo-American practice since the Caroline Incident in the late 1830s and early 1840s series of US/British correspondence is still not representative of the general practice of other European States. The mistaken identity of the ill-fated Iran Airbus whose flight path happened to cross the USS Vincennes in the Persian Gulf led to the unnecessary loss of civilian aircraft and the lives of innocent international passengers and crew. This terrifying act resembles an act of terror which should at all costs be avoided. Nonetheless, the act was attributable to the United States and inevitably engaged US State Responsibility, regardless of absence of criminal intent.

In another incident involving Israel's pre-emptive strike of Iraqi nuclear reactor at Osirak in 1981, the International Atomic Energy Agency (IAEA) did not condone the strike but decided to suspend Israel's right to vote in the Agency for a period of time. Although there was insufficient evidence of nuclear capability then, the fact that in the course of operation 'Desert Storm' ten years later in 1991, a few Iraqi scuds missiles landed in Israeli territory appeared to have belatedly confirmed the legality of Israel's counter-measures in response to the potential threat against its territorial integrity.

In another connection, the unprovoked attacks by the Taliban forces against the Statue of the Standing Buddha at Bamiyan, for which the Afghan Government had earlier applied for registration with UNESCO as a world cultural heritage, seem deservedly to have attracted providential sanctions, in the form of the final fate that awaited the Taliban Government. Thus, the wheel of international justice appears to move in a curious way.

### 3. The US/UK Invasion and Occupation of Iraq in March 2003

Iraq's persistent resistance to comply with United Nations Security Council Resolution 687 of 1991 received further consideration in SCR 1441 of 8 November 2002. Operative paragraph 3 of the Resolution requires the Government of Iraq *to provide to UNMOVIC (United Nations Monitoring and Verification Inspection Commission), the IAEA and the Council (within 30 days) a currently accurate, full and complete declaration of all aspects of its programs to develop chemical, biological and nuclear weapons, ballistic missiles, and other delivery systems such as unmanned aerial vehicles and disposal systems designed for use on aircraft, including any holdings and precise locations of such weapons, components, sub-components, stocks of agents, and related material and equipment, the location and work of its research, development and production facilities, as well as other chemical, biological and nuclear programs, including any which it claims for the purposes not related to weapon production or materials.*

Operative paragraph 4 decides that *failure by Iraq at any time to comply with, and cooperate fully in the implementation of this resolution shall constitute further material breaches of Iraq's obligations and will be reported to the Council.*

Operative paragraph 10 requests *All Member States to give full support to UNMOVIC and the IAEA in the discharge of their mandates* and paragraph 11 directs the Executive

Chairman of UNMOVIC and the Director General of the IAEA to report immediately to the Council any failure by Iraq to comply with its disarmament obligations.

Paragraph 13 recalls *that the Council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations.*

Apart from the arguments based on the right of individual and collective self-defense under Article 51 of the Charter on the specific ground that there was a linkage with the terrorist group, Al Qaeda, UN Security Council Resolution 1441 (2002) provides an alternative or subsidiary foundation in support of US/UK actions in regard to Iraq.

While no definite proof was ever found of the existence of biological or chemical or nuclear arsenals or actual linkage with the Al Qaeda, Security Council Resolution 1441 appears to provide a thin basis for the operation of the combined US/UK forces.

Whether the justification or the lack thereof and whatever conclusion that can be reached on the legitimacy *vel non* of the joint US/UK counter-measures, whether as a self-defense precluding wrongfulness, or as an action authorized by Security Council Resolution 1441 (2002), it can no longer be gainsaid that it is a *fait accompli*. Since 22 May 2003 when the Security Council adopted a compromise in the form of unanimous Resolution 1483, no one can be heard to challenge the legitimacy of the US/UK endeavors, least of all the untimely challenge by the Secretary-General of the United Nations which appears to be way out of order. The Security Council Notes the letter of 8 May 2003 from the Permanent Representatives of the United States and the United Kingdom to the President of the Security Council (S/2003/388) and duly "recognizes the specific authorities, responsibilities, and obligations under applicable international law of these States as occupying powers under unified command (the 'Authority')."

Furthermore, the Council calls on the Authority, consistent with the Charter of the United Nations and other relevant international law, to promote the welfare of Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future.

The respective roles of the United Nations and the Authority within Iraq have been further clarified in Security Council Resolutions 1500 (2003), 1502 (2003) and in particular 1511 (2003) of 16 October 2003, calling upon the Authority to return governing responsibilities and authorities to the people of Iraq as soon as practicable and requests the Authority to report to the Council on the progress being made. It also invites the Governing Council of Iraq to provide to the Security Council a new Constitution for Iraq and for the holding of democratic elections under that Constitution. By Resolution 1520 of 22 December 2003, the Council decides to renew the mandate of the United Nations Disengagement Observer Force (UNDOF) for a period of six months until 30 June 2004.

It should be noted that in principle the US/UK have agreed to withdraw their respective forces by June 30, 2004, although in reality they are still responsible to help the local Iraqi forces to maintain law and order. Now that elections have taken place and the Government of Iraq under the Constitution has been formed, the question of legitimacy of US/UK invasion and occupation by Iraq is no longer relevant. What is pertinent is the return of law and order and the prevalence of the Rule of Law for the Iraqi peoples as well as for the international community.

For all that, the Authority and the United Nations have been cooperating in perfect harmony. The Resolutions adopted by the Security Council in and after 22 May 2003 did more than ratify the rights, responsibilities and obligations of the Authority. It does not mean, however, that the United Nations, or the US/UK Authority, was given license to violate the rules of the law of international armed conflict with immunity. Both the United Nations, as an international organization directly involved, and the US/UK Authority in Iraq has their respective rights, responsibilities and liabilities. They both remain accountable to the international community for their conduct or misconduct in the eyes of international law. *Ref. to Smoot*

#### IV : A JUST WORLD UNDER WORLD LAW OR THE RULE OF [INTERNATIONAL] LAW

It is no use having a world that is peaceful and just but is outside the law or above the law. To be just and peaceful, the world in which we live should also be under law, that is to say under the Rule of Law or to be more precise the Rule of International Law. There is no Imperial National Law that is acceptable to a peaceful world. There should be harmony and compatibility, not necessarily uniformity in the form or structure of government or economic development plan. It is out of date to speak of imperialism, there is no Pax Romana, nor Britanica nor Germanica, neither Franca, nor Americana. There should continue to be the United Nations wherein every State, every people, has the right to participate in the governance and decision-making. There is no recognized prototype democratic institution. Neither the People's Republic, nor the Socialist Republic nor the Democratic Republic can claim the monopoly of being the only acceptable form of democratic government.

The expression the 'Rule of Law' as opposed to the 'Rule of Force' has been coined by Anglo-American school of jurisprudence and constitutionalism. Professor Dicey first used the expression. The British association known as 'JUSTICE', a section of the International Commission of Jurists, a non-governmental organization now located in Geneva, previously in The Hague, together with other national sections such as the 'American Fund for Free Jurists' and others, have convened to reconstruct and identify the components of 'The Rule of Law'. At the Congress of New Delhi, India, in 1959 and subsequently at Lagos, Nigeria, World Congresses of Jurists were convened to discuss and adopt the various elements that serve to reinforce the Rule of Law, namely, freely elected legislature, a responsible executive and an independent judiciary, accompanied by an enlightened legal profession and a free and informed society that contribute to the making of the Rule of Law.

Frequent lip-service has been paid in the United States to the need to observe the Rule of Law, especially for other countries, not to mention the United States.

It is interesting to observe, in this connection, that in paragraph 128 of the judgment on 20 July 1989 of the Special Chamber of the International Court of Justice in the case concerning Elettronica Sicula S.p.A. (ELSI), (USA v. Italy, ICJ Reports 1989, p. 15), the Chamber pointed out that

*"Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. This idea was expressed in the Asylum Case, when it spoke of 'arbitrary action' being substituted for the rule of law, (Asylum*

*Judgment, ICJ Reports 1950, p.284.) It is willful disregard of due process of law, an act which shocks or at least surprises a sense of juridical priority. Nothing in the decision of the Court of Appeal of Palermo conveys any indication that the requisition order of the Mayor was to be regarded in that light."*

Judge Schwebel, the American Member of the Chamber, in his dissenting opinion, did not seem to share the above characterization by all four other Members of the Chamber, including Judge Roberto Ago, the Italian Member. Judge Schwebel characterized the requisition as unreasonable and capricious, and observed further that the process of appeal does not necessarily render a measure otherwise arbitrary non arbitrary. It would not appear that the American Judge shared the sentiment or the views unanimously expressed by the rest of the Chamber.

This is not surprising since Judge Schwebel also dissented in the Nicaragua Case (*Nicaragua v. USA*, ICJ Reports 1986) on most counts where the United States was held by the Court to have violated rules of customary international law on the prohibition of the use of force and on the definition of collective self-defense. The Court has not found the United States to be responsible for the act of terror performed by the Contra, simply for want of direct control and absence of attribution to the United States Government. However, today the attack of 9.11 by the Al Qaeda appears to have brought about a new development in the finding that Afghanistan, or at any rate the Taliban Government, was responsible for harboring and training the terrorists in the territory of Afghanistan, an element of progressive development of international law for the definition of 'terrorism' and State-sponsored or State-tolerated acts of terrorism. In this particular connection, Secretary-General Kofi Annan presented a five-point strategy at the closing plenary session of the International Summit for Democracy, Terrorism and Security in Madrid on 10 March 2005, announcing the creation of an implementation task force under his office to insure that all parts of the United Nations system today play their roles in handling terrorism and related issues. The first of his five D's is a call for a comprehensive convention with a commonly accepted Definition of Terrorism outlawing terrorism in all its forms.

Incidentally, on 11 March 2005, the United Kingdom House of Lords approved the latest version submitted by the House of Commons of the legislation, entitled 'The Prevention of Terrorism Act', defining a *control order* as *an order against an individual that imposes obligations on him for purposes of protecting members of the public from a risk of terrorism*. The viability of this Act deserves further study.

In regard to the presence of Syrian forces and security or intelligence personnel in Lebanon, it has hitherto been taken for granted that it is not Lebanon's responsibility to control or regulate the activities of Syrian forces, nor to prevent the commission of any internationally wrongful act, including acts of terror or sabotage.

It is to be recalled that former President Bush once took occasion in 1991 to remind the world that the 'Rule of Law' has now acquired a new meaning. It has to be accompanied by the reasonable readiness on the part of States to respond to the use of force with equal or proportionate force. This partnership between the Rule of Law and Responsible Use of Force has been introduced by the former President of the United States. It has to be watched with the greatest care. Otherwise it could give rise to considerable abuses and misuses of predominant force in excess of the state of necessity or beyond the limits of the traditionally accepted notion of self-defense.

It is to be recalled that the late Sir Humphrey Waldock once reminded us that the no-definition school relating to 'the definition of aggression' which is the other side of the coin to initiate an act of self-defense, individual or collective, has given rise to considerable problems and uncertainties since the League of Nations. Until today, the absence of a universally acceptable definition of the notion of "act of aggression", so vital and fundamental to the concept of offenses against the peace and security of mankind which could or could not trigger series of acts in self-defense.

Again in the Corfu Channel Case (Merits) (1949), ICJ Reports 1949, page 4, while the Court, including Sir Arnold McNair (United Kingdom) with 14 to 2 votes upheld the United Kingdom's right of innocent passage, it unanimously gave judgment for Albania in respect of the British mine-sweeping operation of 13 November 1946. The Court did not accept United Kingdom's argument and declared that the action of the British Navy alleged to be self-protection or self-help, constituted a violation of Albanian sovereignty, as such an internationally wrongful act. However, at the assessment of compensation phase (1949), *ibid.*, the Court awarded no compensation for Albania's Counter-claim but regarded its ruling and declaration of the internationally wrongful act as 'satisfaction'.

It should be recalled in another context in the U.S.A. v. Iran (Hostages Case) 1980, ICJ Reports, page 3, finding for the United States on several counts in an overwhelming majority judgment of 24 May 1980, the Court took occasion to express its serious concern in a direct fashion, President Sir Humphrey Waldock reading the judgment.

"With regard to the operation undertaken in Iran by United States military units on 24-25 April 1980, the Court cannot fail to express its concern. It feels bound to observe that *an operation undertaken in these circumstances, from whatever motive, is of a kind calculated to undermine respect for the judicial process in international relation.*" This was in reference to the rescue operation ordered by President Carter after Iran refused to abide by the order of provisional measures on 15 December 1979. The provisional order was binding on both parties to the proceeding. The Court ordered in Part B. that "*The Government of the United States of America and the Government of the Islamic Republic of Iran should not take any action and should ensure that no action is taken which may aggravate the tension between the two countries or render the existing dispute more difficult of solution.*"

The measure undertaken by the United States in defiance of the Provisional Order requested by the United States itself closely resembles a clear breach of the 'Rule of Law' in the sense of undermining, as the Court did not fail to observe, respect for the judicial process in international relation.

The lack of any show of respect for international judicial process on the part of the United States which was unique in its withdrawal from the Court's proceedings in the Nicaragua Case appears to have recurred in a different form in a series of cases involving the Court's Order indicating Provisional Measures to suspend the execution of foreign criminal offenders as in the case instituted by Paraguay concerning Angel Francisco Breard (1998), ICJ Reports, 92 AJIL 679, 1988, and for the suspension of the application of the death penalty for two German brothers Karl and Walter LaGrand. In both instances, the Paraguayan national and German brothers were executed in the face of the provisional orders given by the Court in no uncertain terms, and while the cases were still pending for consideration on the merits by the international judicial authority. Breard was executed in Virginia, and Walter LaGrand in Arizona.



Paraguay withdrew the case after the execution of Breard as there was no possibility for *restitutio in integrum*. On the other hand, the Federal Republic of Germany did not give up the pursuit of justice for the breach of obligation under the Vienna Convention on Consular Relations (1963), Article 36 (2), and was not pursuing any claim for compensation for the irreversible death of Walter LaGrand and the earlier execution of Karl LaGrand. Germany was seeking satisfaction that the United States be required to pass legislation to provide for review measures to comply with its obligations under the Vienna Convention of 1963, so as to ensure non-recurrence of future breaches. On the basis of an *amicus curiae* submission by the Solicitor-General of the United States to the effect that *there is substantial disagreement among jurists as to whether an ICJ order indicating provisional measures is binding... The better reasoned position is that such an order is not binding*, the United States Supreme Court denied the stay of execution. From the deliberations of the Members of the International Court of Justice as reflected in the ICJ Reports 1999, page 9, *et seq.*, it is clear beyond any reasonable shadow of doubt that interim orders or interlocutory measures ordered by the Court are binding on the parties to the dispute. In these cases, they were binding on the United States as a sovereign State. It was for the United States to see to it that they were observed. Failure to observe such an order of provisional measures clearly constitutes an internationally wrongful act. Moreover, such a wrongful act connected with due process of law would constitute a violation not only of a rule of law, but more emphatically of the Rule of Law in the international sense of the term (See Rosenne, Controlling Interlocutory Aspects of Proceedings in the International Court of Justice, 94 AJIL 307.)

After this celebrated decision in which Judge Schwebel gave a separate opinion reflecting a more fundamental difference in the United States understanding of the true meaning of the Rule of Law, it became clear that there were many foreign nationals detained in the United States without prior consular notifications. More Mexican nationals have been arrested and awaiting the execution of capital punishment in United States penitentiaries. The most recent case instituted by Mexico v. U.S.A. (Avena and others, ICJ Reports 2004, page 128), resulted in an order of provisional measures in respect of three out of fifty-four Mexican nationals under detention on the death row. It is fortunate that so far there has been no further repetition of disregard by the United States for the interlocutory measures ordered by the Court. There appears to have been additional steps taken on the part of United States administrative authorities to avoid recurring *faux pas* or embarrassments to the United States Government. The State Courts in the United States and United States Courts as well as the United States Supreme Court and State Governors appear to have been better advised of the living reality of the actual situation in international relations. In particular the Presidential Determination of 28 February 2005 virtually confirming the binding authority of the International Court of Justice was opportune. It should suffice to discourage any further dissidents or recalcitrants. The President's Determination, like an executive agreement has independent legal force and effect, and contrary State rules, including doctrines of procedural default, must give way arguably under the Supremacy Clause. We are living in one and the same multicultural world under the same set of rules of international law, and should by now have started to learn, like any sovereign State, to observe and to abide by the International Rule of Law.

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On the matter,  
the Court  
formed on  
March 31, 2004, that  
the USA  
has breached  
its obligation  
to review  
and fifty  
other Mexican  
nationals  
to Mexico

under the Vienna Convention on Consular Relations 1963. (Press Release Dec 8/10)

## V : CONCLUSION

There remain many more bridges to cross in the process of progressive development of international legal education. Globalization of the legal profession is not an undesirable thing, if it is designed in some measure to internationalize United States legal education rather than any attempt to purport to Americanize international or non-U.S. legal education.

What is needed in this country is wider and deeper understanding of the law, in particular, the rules of international law. We, in the United States, need to do much more than merely paying lip-service to the notion of the 'Rule of Law' without fully understanding its universal meaning and broad contents. We must show proper and in-depth appreciation of its values, especially in the context of international relations. For instance, we should not be alarmed by such terms as 'universal jurisdiction' which in reality offers the weakest legal basis for any domestic court claiming to exercise jurisdiction over an offense committed by non-nationals outside its national territory. We should learn to appreciate every international legal concept in its proper setting.

On the other hand, we should recollect the exemplary model of Chief Justice Marshall who, almost a century before the advent of the American Society of International Law, demonstrated leadership in United States understanding of existing rules of international law, their reasoning and justifications, and could even project the future progressive development of the law of nations. We should be proud of United States heritage and the current position of United States law, and not unmindful of the valuable contribution made by our predecessors in the American Society of International Law. Nonetheless, we should not belittle the importance and the binding character of international obligations under the Rule of International Law, or reduce it to mere comity, or *comitas gentium* which is only a matter of courtesy or *courtoisie internationale*, as opposed to a legally binding obligation.

There is of course another facile alternative. We could withdraw from international organizations that compel us to abide by the Rule of International Law, or we could disengage ourselves from international conventions altogether and resort freely, unilaterally and irresponsibly to the use of force unwarranted by international standards. Such a sudden change of status might provide an easy way out of existing legally binding obligations, but it would in no way serve to enhance the ultimate goal of achieving enduring peace.

Casting aside international responsibilities is not really a plausible alternative. It would be inconsistent with Former President Bush's innovation of a new concept of the Rule of Law and its partnership with the "Responsible Use of Force." A sound leader must be enlightened enough not only to lead the country back into harmony with the global community, but also to be a meaningful, useful and constructive participant in the community of free and democratic nations, in the sense accepted not only by us but more significantly by the rest of the world.

Sompong SUCHARITKUL, D.C.L. (Oxon)

San Francisco, April 8, 2005